



A Curated Conspectus of the Life, Love, Law,
Literature and Laughter of Albie Sachs

THE BIOWATCH CASE – VIDEO TRANSCRIPT

CHAPTER: A SHUDDER THROUGH THE SOCIAL JUSTICE MOVEMENT

JUSTICE ALBIE SACHS

A very, very important case that was actually referred to me - the Biowatch Case – which touched on environmental questions. There was a shudder through the whole of the Social Justice Movement and all the NGOs bringing cases, when the High Court, hearing a matter brought by Biowatch, dealing with access to information in the government records of modified genetic materials, about them, from a huge multinational company; and Biowatch wanted to get access to those materials. And the judge granted some access, but denied other access. And the judge ended up by awarding Biowatch to pay the costs of the multinational. Now, this was going to destroy constitutional litigation. People wouldn't give funds to women's rights, anti-racism, gay rights, land rights, environmental rights, if they felt it was going to end up in the pockets of winning litigants.

It would bankrupt the Legal Resources Centre and the Lawyers for Human Rights and the Women's Legal Centre and Environmental Agency and the Children's Law Rights. And they're doing such important work. And there's an appeal to our Court, just on the question of costs.

CHAPTER: THE QUESTION OF COSTS

There were two problems with that. One is, there was a very strong rule - you don't appeal just on questions of costs. The senior court shouldn't be wasting their time. Costs are something that the trial judge hearing the matter deals with. You don't interfere. Otherwise, everybody will be appealing all the time. And the court won't be dealing with substantive issues but the costs. And then there was some rule in the Supreme Court of Appeal that actually forbade appeals on questions of costs, because they were being abused by lawyers who wanted to delay payment. Not for real reasons. They didn't mind losing after another year, but give us another year while the case is being heard. And that was refused.

CHAPTER: HOW TO RESPOND? THE JUDGMENT.

So now we have to hear the matter, and I'm asked to write the judgment for the court. Many of us had been in that sector of the law. I did most of my work pro bono, I didn't charge at all. But others had worked for the Legal Resources Centre elsewhere, they got modest fees. They were used to being part and parcel of the good people if you like, enabling people otherwise too poor, or too far away, or too unknowing of their rights, to vindicate their rights.

And now how to how to respond to that?

My first thoughts were to take what's called a substantive approach to equality before the law on costs. If you bring a case and you're a big multinational, a constitutional case, you've got your costs, you've got your money set aside, your war chest for litigation, and that's fine. If you belong to a group that's got nothing, then justice says you shouldn't be ordered to award costs. My colleagues didn't like that. They didn't like that. Equality before the law is for the rich and poor... for the rich and poor.

So, the theme that emerged was, if you go to court to vindicate a constitutional right, and you win, the state has to pay you. It's usually against the state. If you lose, you pay your own costs, you don't pay the state's costs.

And that's partly because the state has a duty to foster and promote people vindicating their rights. It helps the courts enormously to have these NGOs functioning. They prepare cases well. They have devoted lawyers, passionate lawyers. They bring good evidence. They have a high quality of argument. It enriches the work of the courts and the sense of fairness in society, and does something to mitigate the massive inequalities that we have.

CHAPTER: WINNING, LOSING AND THE STATE

So, the rule now is - it's always quoted as the *Biowatch Case*. The rule is that if you win the case, you get your costs from the state, and if you lose the case, the state pays. And in this case, the state was involved because they were hanging onto the genetically modified organisms information.

So, they were being sued as well as Monsanto. And they could afford. I mean, they litigate all over the world, and they could bear the cost of that kind of litigation.

And so, it's quoted very frequently. It's only if the case being brought is a hopeless case. It's not even a serious case. It doesn't even raise a serious issue. It's almost like an abuse of court. Then your costs don't get paid. But if it's seriously brought, even if you lose completely, you don't pay costs. And that turned out to be extremely important in keeping the doors of the court open to litigants who weren't well off.

THANDI MATTHEWS

Thank you, Judge. I think that also is an important aspect for when we think about marginalised communities and their vulnerability.

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